

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA JOY,
Grievant,

v.

Docket No. 2020-0644-JefED

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant, Donna Joy, was employed by Respondent, Jefferson County Board of Education. On November 12, 2019, Grievant filed a grievance stating, "Violation of W. Va. Code § 6C-2-2(l) in harassment to such an extent to create a hostile work environment in which grievant cannot perform her duties." As relief, "Grievant seeks salary missed during FMLA, return of personal days and to be placed in a hostile free work environment and any and all benefits to which she is entitled."¹

On November 20, 2019, Grievant requested that her grievance be placed in abeyance. The abeyance was extended for Grievant's indefinite leave of absence. After Grievant was elected to the Jefferson County Board of Education, she voluntarily resigned as a teacher, effective June 30, 2020. On July 28, 2020, Grievant requested that her grievance proceed.

A level one hearing was held on August 12, 2020. A level one decision dismissing the grievance as moot was entered on August 31, 2020. On September 2, 2020, Grievant appealed to level two of the grievance process. On November 9, 2020, Grievant appealed to level three. On February 11, 2021, Respondent submitted *Respondent's Motion to*

¹Grievant abandoned her request to be placed in a hostile free work environment and replaced it with a request for a prohibition against ongoing harassment she claims she is subjected to as a member of Respondent Board of Education. See *Proposed Findings of Fact and Conclusions of Law Filed by Donna Joy*.

Dismiss and a memorandum titled *Respondent Jefferson County Board of Education's Memorandum in Support of Motion to Dismiss*. The motion was heard on February 24, 2021. Grievant appeared and was self-represented. Respondent was represented by Laura Sutton, Esq., Bowles Rice LLP. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant took extended FMLA leave for eight months during her employment with Respondent. She alleges she did so to cope with the stress resulting from harassment by Respondent. While this grievance was pending, Grievant voluntarily resigned her position as a teacher after being elected to Respondent Board of Education. Grievant now seeks reimbursement for unpaid time used for FMLA leave and a prohibition against ongoing harassment as a Board member. Respondent proved that the claim for lost wages is moot due to Grievant voluntarily resigning while her grievance was pending. The Grievance Board also lacks jurisdiction over a grievance filed by a member of Respondent Board of Education. Accordingly, this grievance is DISMISSED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed as a teacher by Respondent, Jefferson County Board of Education, when she filed this grievance for harassment and hostile work environment on November 12, 2019.

2. Grievant took a leave of absence under FMLA from November 6, 2019, until June 30, 2020.

3. Grievant alleges that she took FMLA leave to cope with the stress from the harassment and requests reimbursement for the personal and unpaid time she used for FMLA leave.

4. Effective June 30, 2020, Grievant voluntarily resigned as a teacher to assume an elected position as a member of the Jefferson County Board of Education.

5. Grievant also requests that Respondent be prohibited from continuing to harass her as a member of Respondent Board of Education.

Discussion

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

Respondent asserts the grievance is moot because Grievant is no longer employed by Respondent due to her voluntary resignation while the grievance was pending. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3.

Grievant admits she resigned to assume an elected position as a member of the Jefferson County Board of Education and is no longer employed by Respondent as a teacher. She nevertheless argues her claims are not moot. She contends that her employment with Respondent continues in her capacity as a Board member. She alleges that Respondent continues to foment a hostile work environment by allowing the Superintendent to demean and ostracize her from other Board members.

This grievance entails a request for wages that Grievant lost while on FMLA leave and a prohibition against ongoing harassment she claims she is subjected to as a member of Respondent Board of Education. Grievant voluntarily resigned her employment as a teacher to assume her elected position as a member of Respondent Board of Education while this grievance was pending. Thus, Grievant's claim of ongoing harassment against her as a Board member must be dismissed due to lack of jurisdiction. Further, Grievant's claim for lost wages must be dismissed as moot.²

As for jurisdiction, "[a]dministrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

²A moot claim is one that is academic and of no practical value even if the body deciding the claim has jurisdiction to hear the claim. However, if that body lacks jurisdiction to hear a claim, it lacks the authority to address the merits of the claim even if the claim is not moot. See BLACK'S LAW DICTIONARY 1029, 869 (8th ed. 2004).

“The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “‘Employee’ means any person hired for permanent employment by an employer for a probationary, full- or part-time position.” W. VA. CODE § 6C-2-2(e)(1). In assuming her position as a member of the Jefferson County Board of Education, Grievant was not hired for permanent employment but was elected to the position. To assume this position with Respondent Board, Grievant voluntarily resigned from her employment with Respondent as a teacher. Thus, Grievant is not an employee for purposes of pursuing a grievance before the Grievance Board. As such, the Grievance Board does not have jurisdiction to address ongoing harassment Grievant claims she receives as a member of Respondent Board.

As for mootness, “[w]hen a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, ‘a decision on the merits of her grievance would be a meaningless exercise, and would merely constitute an advisory opinion.’ *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997); *Wright v. Div. Motor Vehicles & Div. of Pers.*, Docket No. 2013-0714-DOT (Jul. 14, 2014); *Komorowski, supra*.” *Samuel v. DHHR*, Docket No. 2017-2008-DHHR (Aug. 2, 2017). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012). “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of

controverted rights of persons or property, are not properly cognizable [issues].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

As Grievant voluntarily resigned while her grievance was pending, her request for lost wages is moot. Constructive discharge or termination would have allowed Grievant to at least argue this claim was not moot.³ Since her resignation was voluntary, Grievant was not constructively discharged. Addressing the merits of this claim would therefore be speculative. The Grievance Board will not decide matters that are “speculative or premature, or otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994). Further, the Grievance Board lacks jurisdiction over Grievant’s claim of ongoing harassment as a member of Respondent Board of Education. Therefore, this grievance must be dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure

³“The Grievance Board considers potential constructive discharge cases, as similar in nature to those cases in which a respondent has terminated a grievant’s employment.” *Quigley v. Kanawha County Board of Education*, Docket No. 01-20-105 (Aug. 30, 2001).

to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

2. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

3. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (*citing* Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

4. "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1).

5. Thus, the Grievance Board does not have jurisdiction to address harassment Grievant claims she receives as a member of Respondent Board of Education.

6. "When a grievant is no longer an employee due to a voluntary resignation while a grievance is pending, 'a decision on the merits of her grievance would be a

meaningless exercise, and would merely constitute an advisory opinion.’ *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997); *Wright v. Div. Motor Vehicles & Div. of Pers.*, Docket No. 2013-0714-DOT (Jul. 14, 2014); *Komorowski, supra.*” *Samuel v. DHHR*, Docket No. 2017-2008-DHHR (Aug. 2, 2017).

7. Grievant’s voluntary resignation from employment with Respondent before this matter was resolved renders her request for back wages moot.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this final order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this order. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See also W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: April 2, 2021

Joshua Fraenkel
Administrative Law Judge